Supreme Court, U.S.
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In The

Supreme Court of the United States

ANTONIO GUEVARA MENDOZA, individually, as surviving father of CAROLINA GUEVARA RODRIGUEZ, deceased; MARTHA RODRIGUEZ del VALLE, individually, as surviving mother of Carolina Guevara Rodriguez, deceased; et al.,

Petitioners,

v.

BRIDGESTONE FIRESTONE NORTH AMERICAN TIRE, LLC and FORD MOTOR COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

These products liability cases were transferred from the U.S.D.C. for the Western District of Texas to the multidistrict litigation (MDL) proceedings in the U.S.D.C. for the Southern District of Indiana. The MDL judge denied Ford and Bridgestone Firestone's motion to dismiss the cases on *forum non conveniens* grounds and remanded the cases back to the Western District of Texas. On remand, the Western District of Texas denied Ford and Bridgestone Firestone's motion to reconsider the MDL judge's *forum non conveniens* ruling. Ford and Bridgestone Firestone filed a Petition for Writ of Mandamus with the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit concluded that the Western District of Texas erred in not overruling the MDL judge's *forum non conveniens* ruling and ordered the court to enter a judgment of dismissal of the cases.

The question presented is:

> Can a party to a MDL proceeding conducted pursuant to 28 U.S.C. § 1407 seek to overturn an adverse *forum non conveniens* pretrial ruling by the transferee district court through mandamus to the circuit court with appellate authority over the transferor district court rather than the circuit court with such authority over the transferee district court after the cases are returned to the transferor district court for trial?

LIST OF PARTIES

The additional Petitioners not listed on the cover are:

– ROSA VIDRIO CALVO, individually; JAIME VALDES CRODA, individually; EDUARDO VALDES VIDRIO, minor, individually, by and through his father and next friend Jaime Valdes Croda; RAFAEL VALDES VIDRIO, minor, individually, by and through his father and next friend Jaime Valdes Croda; LORENA del CARMEN ARRES VIDRIO, minor, individually, by and through her mother and next friend Rosa Vidrio Calvo; JUAN MIGUEL ARRES NAVARRETE, individually.

– MARISOL GOMEZ LOPEZ, individually; MARIO MANUEL OSORIO GOMEZ, minor, individually, by and through his mother and next friend, Marisol Gomez Lopez; MARIO MANUEL OSORIO CAMPOS.

– ROBERTO ACENCIO VALLE, minor, as surviving child of ROBERTO ACENCIO LOZANO, deceased, by and through his mother and next friend Margarita Valle Chavelas; ISAAC ISRAEL ACENCIO VERGARA, minor, as surviving child of Roberto Acencio Lozano, deceased, by and through his mother and next friend, Rocio Vergara Romano; ROBERTO ACENCIO MARTINEZ, individually, as surviving father of Roberto Acencio Lozano, deceased.

LIST OF PARTIES – Continued

– ESTEBAN QUIJANO BONFIL; CARLOS ORTIZ ANDRAE; YADIRA BALTAZAR ZAMUDIO; IVANA QUIJANO BALTAZAR, minor.

– OLIVER FLORES BARENO, individually; JOSE RAMON GARFIAS HERNANDEZ, individually.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
FEDERAL STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	12
The decision of the Fifth Circuit Court of Appeals to exercise mandamus authority over the *forum non conveniens* rulings by the MDL court (transferee court) in these cases after their return to the trial court in Texas (transferor court), under the auspices of reviewing the trial court's refusal to reconsider the MDL court's pretrial ruling, contravenes the purpose of the Multidistrict Litigation Statute, 28 U.S.C. § 1407, and decisions of the Seventh, Fourth, and Second Circuit Courts of Appeals. To permit continuous re-litigation of pretrial issues properly resolved through the MDL process will create procedural and substantive chaos in the MDL system and result in the very non-uniformity the MDL system was designed to prevent	12
CONCLUSION	21

TABLE OF CONTENTS – Continued

Page

APPENDIX

Opinion – *In re: Ford Motor Company and Bridgestone Firestone North American Tire LLC,* 591 F.3d 406 (5th Cir. Dec. 16, 2009) A-1

MDL Judge Sarah Evans Barker's Order Denying Respondents' Motion to Dismiss on Grounds of *Forum Non Conveniens* (U.S.D.C. for the Southern Dist. of Indiana July 16, 2007) B-1

United States District Judge Harry Lee Hudspeth's Order Denying Respondents' Motion to Reconsider (U.S.D.C. for the Western Dist. of Texas Dec. 22, 2008) C-1

TABLE OF AUTHORITIES

Page

CASES

American Dredging Co. v. Miller, 510 U.S. 443 (1994) 7

Caissee Nationale de Credit Agricole v. CBI Indus., Inc., 90 F.3d 1264 (7th Cir. 1996) 9

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988) 18

El-Fadl v. Central Bank of Jordan, 75 F.3d 668 (D.C. Cir. 1996) 7

FMC Corporation v. Glouster Engineering Co., 830 F.2d 770 (7th Cir. 1987), *cert. dismissed sub nom., Reifehauser GmbH & Co. Maschinenfabrik, et al. v. FMC Corporation*, 486 U.S. 1063 (1988) 14, 15, 16

In re Bridgestone/Firestone, Inc., 305 F.Supp.2d 927 (S.D. Ind. 2004) 10

In re: Bridgestone/Firestone, Inc. Tires Products Liability Litigation, 470 F.Supp.2d 917 (S.D. Ind. 2006) 11

In re: Bridgestone/Firestone, Inc., 420 F.3d 702 (7th Cir. 2005) 11

In re: Food Lion, 73 F.3d 528 (4th Cir. 1996) 16, 17

In re: Ford Motor Company, 580 F.3d 308 (5th Cir. 2009) (superseded) 1

In re: Ford Motor Company, 591 F.3d 406 (5th Cir. 2009) 1

TABLE OF AUTHORITIES – Continued

Page

In re: Ford Motor Company, 344 F.3d 648 (7th Cir. 2002) 6

In re: Multi Piece Rim Prods. Liab. Litig., 653 F.2d 671 (D.C. Cir. 1981) 18

In re: PCH Associates, 949 F.2d 585 (2d Cir. 1991) 18

Piper Aircraft v. Reyno, 454 U.S. 235 (1983) 8

Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240 (1964) 13

Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp., 549 U.S. 422 (2007) 7

Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28 (2002) 13

Veba-Chemie A.G. v. M/V GET-AFIX, 711 F.2d 1243 (5th Cir. 1983) 8

Winkler v. Eli Lilly & Co., 101 F.3d 1196 (7th Cir. 1996) 16

Yuba Natural Res., Inc. v. United States, 904 F.2d 1577 (Fed. Cir. 1990) 9

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(b) 9, 10, 15, 16

28 U.S.C. § 1294 4

28 U.S.C. § 1294(1) 13

28 U.S.C. § 1404 7

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1407 ..... *passim*

28 U.S.C. § 1631 13

28 U.S.C. § 1651(a) 13

COURT RULES

Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 199 F.R.D. 425 (2001), Rule 7.4 5

Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 199 F.R.D. 425 (2001), Rule 7.6(c) 9

OTHER AUTHORITIES

Black's Law Dictionary (6th ed. West 1990) 8

Weigle, S.A., *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575 (1977) 17

18 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure*, § 4478 (1981) 18

Manual For Complex Litigation, § 20.133 ..... 19, 20

H.R.Rep. No. 1130, 90th Cong. 2d Sess., Reprinted in *U.S. Code Cong. & Admin. News* 1898, 1900 14

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued an Opinion on August 21, 2009, granting a Petition for Writ of Mandamus filed by Ford Motor Company and Bridgestone Firestone North American Tire LLC (formerly Bridgestone Firestone, Inc.) against the above named Petitioners on February 6, 2009. *See In re: Ford Motor Company*, 580 F.3d 308 (5th Cir. 2009) (superseded). On December 16, 2009, the Fifth Circuit Court denied the Petitioners' petition for review *en banc* and issued a revised Opinion to replace the August 21, 2009, panel opinion. *See In re: Ford Motor Company,* 591 F.3d 406 (5th Cir. 2009). A copy of the opinion is attached hereto as Appendix A.[1]

[1] References to the pages of the Appendix shall be made by referring to the particular document "A," "B", or "C" and the page number for that particular document, *e.g.*, "App. A-1 through A-2"; "App. B-15" "App. C-5".

JURISDICTION

On December 16, 2009, the Fifth Circuit Panel denied the Petitioners' petition for *en banc* review of its prior opinion and filed its revised decision directing U.S. District Judge Henry Lee Hudspeth to enter a judgment of dismissal of Petitioners' cases in the U.S.D.C. for the Western District of Texas. This Court has jurisdiction to review the circuit court's decision on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 1407 (excerpt), which provides:

Sec. 1407. **Multidistrict litigation**

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the

district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

* * *

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time

by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

* * *

Title 28 U.S.C. § 1294 (excerpt), which provides:

Sec. 1294. **Circuits in which decisions reviewable**

> Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:
>
> (1) From a district court of the United States to the court of appeals for the circuit embracing the district;
>
> * * *

STATEMENT OF THE CASE

Petitioners are citizens of Mexico representing themselves and/or deceased or injured family members as a result of traffic accidents in Mexico involving defective Bridgestone Firestone tires on Ford Motor Company vehicles. There were many such accidents involving Bridgestone Firestone tires (manufactured in the United States or Canada) and Ford sport utility vehicles (manufactured in the United States) that resulted in civil litigation in federal and state courts in the United States. Beginning on October 24, 2000, pursuant to Rule 7.4 of the *Rules of Procedure of the Judicial Panel on Multidistrict Litigation*, 199 F.R.D. 425, 435-36 (2001), the Judicial Panel has transferred more than 750 of those pending products liability cases to the United States District Court for the Southern District of Indiana (MDL court), in the Seventh Circuit, for coordinated or consolidated pretrial proceedings, pursuant to the

Multidistrict Litigation Statute, 28 U.S.C. § 1407 (MDL statute).

The Judicial Panel assigned United States District Judge Sarah Evans Barker (MDL judge) to manage and conduct pretrial proceedings in the MDL cases.[2] Petitioners' six cases (arising from three separate accidents) were originally filed in 2003 in Texas state courts and removed by the Respondents[3] to the United States District Court for the Western District of Texas, in the Fifth Circuit (based on diversity of citizenship). The cases were then transferred to the Southern District of Indiana in 2004, in the Seventh Circuit, without objection, and assigned to MDL Judge Barker.

Prior to the transfer of Petitioners' cases, Respondents had sought through multiple filings to obtain dismissal of many of the MDL cases on *forum non conveniens* (*FNC*) grounds where plaintiffs were foreign nationals and the accidents had occurred in foreign countries.[4] *See e.g., In re: Ford Motor Company*,

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[2] The cases in this complex product liability multidistrict litigation are consolidated in *In re: Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, MDL No. 1373, United States District Court, Southern District of Indiana, Indianapolis Division, Master File No. IP 00-9373-C-B/S and IP 00-9374-C-B/S.

[3] Ford and Firestone are referred to collectively here as "Respondents" or "Respondent corporations."

[4] This Court has held the federal doctrine of *forum non conveniens* has continuing application only in cases where the

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344 F.3d 648 (7th Cir. 2002) (rejecting mandamus to overturn MDL Judge Barker's denial of *FNC* motions in 121 cases filed by Venezuelan and Colombian nationals arising out of accidents in their home countries). On December 7, 2006, Respondent Firestone filed with the MDL court a "Motion To Adopt and Join All Previous Filings Relating to *Forum Non Conveniens* and Request for Judicial Notice Thereof," in which it sought to have Petitioner's cases (and three others) dismissed on *FNC* grounds. Respondent Ford joined in Firestone's motion on December 28, 2006. Petitioners filed their Response to the motion on January 8, 2007. On July 16, 2007, in a written order, Judge Barker denied Respondents' request to dismiss Petitioners' cases on *FNC* grounds, holding that the Respondents had failed to satisfy their burden of proving that Mexico was an available alternate forum in which to litigate Petitioners' cases.[5]

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alternate forum is available. *American Dredging Co. v. Miller*, 510 U.S. 443, 448, n. 2 (1994). *See* 28 U.S.C. § 1404.

[5] Judge Barker's Order is attached as Appendix B. Judge Barker found the defense expert's evidence on availability to be both internally inconsistent and inconsistent with the plaintiffs' evidence. App. B-7 through B-15. Although it is the defendants' burden to invoke the doctrine of *forum non conveniens* and prove the availability of an alternate forum, *see e.g., Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422, 430 (2007), here the plaintiffs presented extensive documentary evidence to Judge Barker on the unavailability of Mexico as an alternate forum due to refusal by Mexican courts to accept jurisdiction in similar cases. *See El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 679 (D.C. Cir. 1996) (satisfaction of defendants'

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On the same day, Judge Barker also entered a "Suggestion of Remand" concluding the pretrial proceedings and asking the judicial panel to return Petitioners' cases to the transferor court, pursuant to 28 U.S.C. § 1407(a). On August 9, 2007, the MDL

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burden on *FNC* challenge depends on alternate forum's acceptance of the case). Conversely, the Fifth Circuit found that the defendant corporations could not fail in their burden of proof if the Mexican plaintiffs did not affirmatively present expert evidence to overcome a presumption of availability established by its prior cases. App. A-16 through A-17. Even if a showing that defendants are willing to submit to the jurisdiction of the alternate forum is deemed to have shifted the *FNC* burden to plaintiffs to prove unavailability, Petitioners' submissions from Mexican courts showing that those courts reject jurisdiction in cases where defendant corporations are not domiciled in Mexico more than met that burden in the MDL court.

The Fifth Circuit did not consider that evidence. Instead, the Court looked to its prior decisions in which the issue of availability of a Mexican forum was not litigated but merely accepted by the Court based upon stipulation or agreement by defendants to submit to Mexican jurisdiction. App. A-12 through A-15. *Cf. Piper Aircraft v. Reyno*, 454 U.S. 235, 255, n. 12 (1983) (finding availability requirement is met when defendant is amenable to the alternate jurisdiction). Amenability is defined as "subject to answer to the law of . . . " *See* Black's Law Dictionary, at 80 (6th ed. West 1990) "Submission to" and "amenability to" a forum are distinct questions – the first asking whether a defendant will agree to submit to an alternate forum, and the second asking whether a defendant is subject to answer to the law of another forum. If Mexican courts deny jurisdiction in these types of cases, the defendants are not subject to answer to Mexican law. Thus, the Respondents' and the Fifth Circuit Court's reliance on *Veba-Chemie A.G. v. M/V GET-AFIX*, 711 F.2d 1243, 1245 (5th Cir. 1983), *citing Piper Aircraft*, is misplaced. 591 F.3d at 412.

Panel issued a conditional order to remand Petitioners' cases to United States District Court for the Western District of Texas, effective August 24, 2007. *See* Rule 7.6(c), *Rules of Procedure of the Judicial Panel on Multidistrict Litigation.* Respondents objected to the remand, and they filed in the MDL court on August 13, 2007, a "Motion to Reconsider Entry Regarding *Forum Non Conveniens* Issues or, in the Alternative, to Certify for Appeal Pursuant to 28 U.S.C. § 1292(B)." The Judicial Panel denied the objection and ordered the cases remanded on December 21, 2007. On February 4, 2008, MDL Judge Barker entered an order denying that motion as moot due to the remand.[6]

When Petitioners' case files were returned for trial to the Texas federal district court in April 2008, they were assigned to Senior United States District Judge Harry Lee Hudspeth.[7] Although Judge Barker

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[6] Reconsideration is not a matter of right but is granted at the discretion of the court. *See e.g., Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990). *See also Caissee Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996) (motion for reconsideration "is not an appropriate forum for rehashing previously rejected arguments").

[7] The federal district court clerk in Texas received the files on Petitioners' cases from the MDL court on April 28, 2008, and on August 7, 2008, Judge Alia Ludlum reassigned them to Judge Hudspeth for trial. Notably, while the cases had been pending in the American courts all of the fact witnesses in Mexico and all of the Mexican Plaintiffs in the cases set for trial had been deposed.

had denied Respondents' motion in February 2008, on October 20, 2008, the Respondent Ford Motor Company filed a "Defendant's Motion For Ruling on Motion Still Pending After Remand," and Respondent Firestone joined in that motion on October 22, 2008. The motion asked Judge Hudspeth to reconsider and reverse MDL Judge Barker's denial of their *FNC* motions in these cases. In an order filed December 22, 2008, Judge Hudspeth found there were no extraordinary circumstances to justify reconsideration of Judge Barker's order and denied Respondents' motion.[8]

On February 6, 2009, Respondents filed a Petition for Writ of Mandamus in the United States Fifth Circuit Court of Appeals asking the appellate court to issue a writ of mandamus directing Judge Hudspeth to (1) vacate his order denying reconsideration of their *FNC* motion; (2) grant their motion; and (3) order Petitioners' cases dismissed in favor of the available Mexican forum.[9] In its December 16, 2009,

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[8] Judge Hudspeth's order is attached as Appendix C. Judge Hudspeth also denied Respondents' alternative request to certify an interlocutory appeal under 28 U.S.C. § 1292(b). In the order, the judge noted that the parties "had a full and fair opportunity to litigate the issue of *forum non conveniens* before Judge Barker. . . ." *See* App. C-3.

[9] In their *FNC* filings in Petitioners' cases, the Respondents supported their position on the *FNC* issue by equating Petitioners' cases to earlier dismissed cases in the MDL court in which Mexican plaintiffs assumed availability, but argued against the adequacy, of a Mexican court forum. *See In re Bridgestone/Firestone, Inc.*, 305 F.Supp.2d 927 (S.D. Ind. 2004). On appeal of the dismissal order to the Seventh Circuit Court of Appeals in

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revised Order granting Respondents' Petition for Writ of Mandamus, the Circuit Court directed "the district court to render judgment of dismissal without prejudice, because Mexico is an available and appropriate forum." The Court also stated: "Plaintiffs can refile this suit and proceed to trial in the Western District of Texas on a sufficient showing that the Mexican courts are unavailable for this litigation despite

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those cases, a plaintiff attempted to supplement the record and argument with after-acquired documents showing the unavailability of a Mexican forum. [After the MDL court dismissal, the Manez-Reyes family had sued the Respondent corporations in Mexico, but the Mexican court dismissed the case, *ex parte*, holding that it did not have jurisdiction over the companies not domiciled in Mexico.] *In re: Bridgestone/Firestone, Inc.*, 420 F.3d 702, 705 (7th Cir. 2005). The circuit court expressed concern about whether the dismissal in that case was obtained "in good faith." *Id.* at 706. The court remanded the case to Judge Barker to "thoroughly explore the circumstances surrounding the [Mexico court] decisions." *Id.* On remand, Judge Barker found the Mexican court decision in the *Manez* case was obtained in bad faith and not subject to recognition for FNC purposes, and reinstated her previous dismissal on *FNC* grounds. *In re: Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 470 F.Supp.2d 917, 920 (S.D. Ind. 2006).

Conversely, there is no evidence that Petitioners' documentary evidence before Judge Barker in the instant cases was obtained fraudulently or in bad faith. Not only was the *Manez* case and the circuit court's expressed concerns about the *Manez* Mexican court decision not substantively or procedurally relevant to Petitioners' cases, it clearly served to obfuscate the independent *FNC* issues in Petitioners cases. Judge Barker recognized the inapplicability of the *Manez* case or her concerns expressed therein (referred to by Judge Barker as the "Lopez" case) in her order denying *FNC* dismissals in Petitioners cases here. *See* App. B-5 through B-6.

petitioners' submission to jurisdiction there."[10] *See* App. A-24.

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit Court of Appeals to exercise mandamus authority over the *forum non conveniens* rulings by the MDL court (transferee court) in these cases after their return to the trial court in Texas (transferor court), under the auspices of reviewing the trial court's refusal to reconsider the MDL court's pretrial ruling, contravenes the purpose of the Multidistrict Litigation Statute, 28 U.S.C. § 1407, and decisions of the Seventh, Fourth, and Second Circuit Courts of Appeals. To permit continuous re-litigation of pretrial issues properly resolved through the MDL process will create procedural and substantive chaos in the MDL system and result in the very non-uniformity the MDL system was designed to prevent.

The Fifth Circuit Court of Appeals determined that the issue of whether it had the authority to

[10] Judge Hudspeth dismissed Petitioners' cases pursuant to the Fifth Circuit order. The original Fifth Circuit Panel (Smith, Stewart, and Southwick, JJ.) opinion was issued August 21, 2009. Judge Hudspeth's minute order dismissing the cases was filed in the district court on September 20, 2009, before the Fifth Circuit denied *en banc* review and filed a revised opinion on December 16, 2009.

"grant mandamus on a district court's refusal to reconsider a pretrial MDL (multidistrict litigation) decision" to be one of first impression in its circuit. App. A-7. The All Writs Act, 28 U.S.C. § 1651(a), permits federal courts to issue writs "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The Act does not independently confer jurisdiction; rather, a court must have independent subject matter jurisdiction before it can invoke its writ authority. *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 31 (2002). The effect of the Circuit Court's exercise of its writ authority was to erroneously extend its appellate jurisdictional reach to overrule a *forum non conveniens* decision rendered by a district court in another federal judicial district. *See* 28 U.S.C. § 1294(1) (limiting jurisdiction of appellate courts to their territorial circuits).[11] The Court's decision thwarts the purpose of multidistrict litigation, it is contrary to decisions in other federal circuit courts, and it warrants review by this Court. *Cf. Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240 (1964) (Supreme Court granted certiorari in mandamus case involving

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[11] *See also* 28 U.S.C. § 1631, which permits an appellate court to transfer a case to the appellate court with appropriate jurisdiction. Under this statute, upon proper determination that it did not have jurisdiction over the *FNC* orders of the transferee court, the Fifth Circuit Court could have ordered the case transferred to the Seventh Circuit embracing the MDL district court.

antitrust prosecution in view of importance of question to the prosecution of multi-venue cases).

The statute authorizing multidistrict litigation, 28 U.S.C. § 1407, was enacted in 1968 to provide for consolidated, coordinated pretrial proceedings in federal civil cases. 28 U.S.C. § 1407(a). *See also H.R.Rep. No. 1130, 90th Cong. 2d Sess.*, Reprinted in *U.S. Code Cong. & Admin. News* 1898, 1900. The statute created a seven-judge judicial panel with broad authority to order cases transferred from multiple federal districts (transferor courts) to a single federal district (transferee court) and assign judge(s) within that district to preside over the consolidated proceedings. 28 U.S.C. § 1407(d).

Section 1407(e) provides a singular remedy to challenge orders under the statute, specifically: "Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district." While this provision reaches those orders issued by the judicial panel, it has been held consistently that challenges to pretrial orders issued by an MDL transferee court authorized by the statute must likewise be taken to the court of appeals for that district and not the court of appeals for the transferor court. *FMC Corporation v. Glouster Engineering Co.*, 830 F.2d 770 (7th Cir. 1987), *cert. dismissed sub nom., Reifehauser GmbH & Co. Maschinenfabrik, et al. v. FMC Corporation*, 486 U.S. 1063 (1988).

In *FMC Corporation,* the suit was originally filed in Illinois federal district court in the Seventh Circuit, and the German defendants moved for dismissal. 830 F.2d at 770. Pursuant to Section 1407, the case was transferred for consolidated pretrial proceedings to the federal district court in Massachusetts, a federal district court in the First Circuit. *Id.* When the Massachusetts district court denied the defendants' motion to dismiss, the defendants sought review by the Seventh Circuit Court of Appeals under 28 U.S.C. § 1292(b) permitting interlocutory appeal under limited circumstances. *Id.* Analyzing the issue on first impression, Judge Posner held that the Seventh Circuit Court of Appeals lacked jurisdiction to hear an appeal from a pretrial order of an MDL district court sitting outside the Seventh Circuit, noting:

> Although the multidistrict statute does not say which court of appeals has jurisdiction over appeals from orders by the district court to which a case is transferred, most cases hold that it is the court of appeals covering the transferee court rather than the one covering the transferor court. [citations omitted] Indirect support for this conclusion comes from the statute's provision on venue for review by extraordinary writ of post-transfer orders issued by the multidistrict panel. *See* 28 U.S.C. § 1407(e).

Id. at 771. The Court reasoned that a rule confining appellate jurisdiction over all orders issued by an MDL transferee court to the court of appeals

embracing such transferee court "is simple to administer and free from uncertainty." *Id.* The Respondent corporations in the instant cases argued that, even assuming a general rule against their position, an exception (in the guise of a writ) was necessary due to the nature of the *FNC* rulings and the transferee court's denial of their motion for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Seventh Circuit specifically rejected creating an exception in the context of Section 1292(b). *Id.* at 772. *See also Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1201-02 & n. 5 (7th Cir. 1996) (A transferee court's statutory power to control multidistrict litigation necessarily includes equitable power, after remand, to interpret scope and protect integrity of orders it issued while in charge of consolidated lawsuits.).

In *In re: Food Lion,* 73 F.3d 528 (4th Cir. 1996), eleven separate federal cases, brought under the Fair Labor Standards Act by employees and former employees of the defendant corporation's grocery stores (ultimately including a thousand such employees), were transferred and consolidated for pretrial proceedings pursuant to the multidistrict litigation statute. *Id.* at 531. After the transferee court granted summary judgment and dismissed about half of the cases and sent others back to their original transferor courts by order of the Judicial Panel, some plaintiffs sought and received certifications for immediate appeal from their original transferor district courts. *Id.* In its analysis and ultimate rejection of the certifications by the transferor courts, the Fourth

Circuit Court relied on the reasoning of the early judicial panel supporting a prohibition against transferor judges modifying orders of transferee judges:

> "[I]t would be improper to permit a transferor judge to overturn orders of a transferee judge even though error in the latter might result in reversal of the final judgment of the transferor court. If transferor judges were permitted to upset rulings of transferee judges, the result would be an undermining of the purposes and usefulness of transfer under Section 1407 for coordinated or consolidated pretrial proceedings because those proceedings would then lack the finality (at the trial court level) requisite to the convenience of witnesses and parties and the efficient conduct of actions." *Weigle, S.A., The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts,* 78 F.R.D. 575, 577 (1977).

Id. The Court in *Food Lion* also rejected the possibility of review of transferee court orders by the Courts of Appeals embracing the transferor district courts as frustrating the aims of the Section 1407. *Id.* at 532. Here, Judge Hudspeth properly rejected the Respondent corporations' alternative request to certify the MDL court's decision for appeal to the Fifth Circuit, but the Respondents circumvented proper application of Section 1407 by framing what was essentially an impermissible interlocutory appeal on the *FNC* issue as a request for a writ of mandamus.

Lastly, in *In re: PCH Associates,* 949 F.2d 585 (2d Cir. 1991), involving complex debtor/creditor litigation in bankruptcy, the Second Circuit Court recognized the applicability of the general "law of the case" doctrine to decisions made during the course of ongoing litigation between the same parties. Under that doctrine, a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation. *Id.* at 592, *relying on Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988), and *quoting* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure*, § 4478, at 788 (1981); *to wit*:

> Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. These rules do not involve preclusion by final judgment; instead they regulate judicial affairs before final judgment.

This justification for deference is as applicable, if not more so, in the context of multidistrict litigation, which invariably necessitates consistent, on-going resolution of complex legal issues involving large numbers of litigants at different stages of the litigation. *See also In re: Multi Piece Rim Prods. Liab. Litig.*, 653 F.2d 671, 678 (D.C. Cir. 1981) ("The doctrine of the law of the case has its application in multidistrict litigation as well as traditional litigation. [citations omitted]. . . . Proper coordination

of complex litigation may be frustrated if other courts do not follow the lead of the transferee court.")

In its opinion, the Fifth Circuit recognized both the validity and applicability of authority from other circuit courts in the context of Section 1407 multi-district litigation, as well as the manuals on multi-district and complex litigation. App. A-8 through A-10. ("[W]e note that authorities are unanimous that some deference must be given to the transferee court's decisions." App. A-8.).[12] Yet, the Fifth Circuit chose to parse the concept of deference in an attempt to overcome such unanimity. The Fifth Circuit created multiple declining levels of deference; *i.e.*, "bright-line rule that a transferor court cannot overrule a transferee court," "substantial deference, "general deference," and "law-of-the-case" deference, levels heretofore unknown and unsupported in this context, and ultimately held that transferor courts need only use a law-of-the-case approach, the lowest level of deference under its rationale, to determine whether

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[12] The Court acknowledged but ultimately rejected language in the *Manual For Complex Litigation*, § 20.133, as well as the language in the *Weigle* treatise (quoted above), which was also included in the *Manual For Complex Litigation*, § 20.133. *See* App. A-7 through A-10. The language in *Weigle* was cited for the obvious purpose to demonstrate under what circumstances the "law of the case" doctrine could *not* be relied upon by a transferor judge to vacate or modify a ruling of an MDL transferee court. Rather than supporting the Fifth Circuit's position, the language from *Weigle* clearly shows that under the circumstances of these cases, the transferor court could not reconsider the MDL court's decision.

to revisit a transferee court's decision. App. A-8 through A-10. Applying that approach, the Fifth Circuit held the MDL court's *FNC* decision was a "manifest injustice" to the Respondents; and, as such, relieved the transferor court of the necessity of giving such deference to transferee court's decision. *Id.*

Although it is unclear how requiring these American corporations to litigate these cases involving their American-made products in American courts creates a "manifest injustice," Petitioners submit that the distinctions created by the Fifth Circuit in order to overcome "unanimous authority" to the contrary are false distinctions in the context of multidistrict litigation. The authorities cited in the Fifth Circuit's opinion discuss the necessity of prohibiting modification of rulings by transferee courts, as stated succinctly in the *Manual For Complex Litigation*, § 20.133, "in the absence of a significant change of circumstances." This is the measure of the deference defined and applied by the case law and the treatises to decisions by transferee courts and to MDL courts specifically. As Judge Hudspeth held, there was no such "significant change in circumstances" in these cases, and the Fifth Circuit erred in granting the writ in order to accomplish indirectly what it was jurisdictionally prohibited from doing directly.

CONCLUSION

The Multidistrict Litigation statute has permitted the orderly management and resolution of cases involving common issues and multiple parties in multiple venues. To permit the parties to re-litigate decisions by the MDL judges in individual transferor district and appellate courts will vitiate the legal efficacy and binding force of the statute and defeat the procedural and substantive consistency needed to satisfy due process in these complex cases. As Judge Hudspeth noted in his order denying reconsideration of MDL Judge Barker's decision in these cases, to do otherwise would mean that "the four years [the parties] spent in the MDL process would have accomplished nothing except to delay the rights of these Plaintiffs to have their day in court." App. C-3. Petitioners submit that this Court should grant certiorari in these cases to preserve the integrity of the statute and to rectify what has, in fact, become a manifest injustice to the Petitioners by denying them the right to have their "day in court" in their chosen forum.

Respectfully submitted,

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591 F.3d 406

United States Court of Appeals,
Fifth Circuit.

In re: FORD MOTOR CO., a Delaware Corporation; Bridgestone/Firestone North American Tire LLC, the Successor to Bridgestone/Firestone, Inc., Petitioners.

No. 09-50109.

Dec. 16, 2009.

Wade Crosnoe (argued), Michael W. Eady, Thompson, Coe, Cousins & Irons, L.L.P., Austin, TX, for Ford Motor Co.

Craig Alan Morgan, Austin, TX, for Petitioners.

Phillip Bruce Dye, Jr., Knox D. Nunnally, Vinson & Elkins, L.L.P., Houston, TX, for Bridgestone/Firestone North Am. Tire, LLC.

John M. Merritt (argued), Merritt & Associates, P.C., Oklahoma City, OK, for Plaintiffs-Respondents.

Petition for Writ of Mandamus to the United States District Court for the Western District of Texas.

ON PETITION FOR REHEARING EN BANC

(Opinion 580 F.3d 308 (Aug. 21, 2009))

Before SMITH, STEWART and SOUTHWICK, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. No member of the panel or judge in regular active service having requested that the court be polled on rehearing en banc (FED. R.APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

The following opinion is substituted for the original opinion for the purpose of correcting minor factual errors and providing additional explanation. No further request for rehearing or rehearing en banc will be permitted.

* * *

Before SMITH, STEWART and SOUTHWICK, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Ford Motor Company ("Ford") and Bridgestone/ Firestone North American Tire LLC ("Firestone")[1] requested that the district court reconsider a pretrial *forum non conveniens* ("FNC") motion that had been denied by a multidistrict litigation ("MDL") court. The district court declined the request, so petitioners seek a writ of mandamus. We grant the writ.

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[1] We refer to Ford and Firestone collectively as "petitioners."

I.

Plaintiffs are several Mexican citizens who were injured in Mexico in vehicle accidents involving Ford sport utility vehicles and Firestone tires. They sued Petitioners in Val Verde County, Texas, state court, and petitioners removed to federal court in the Western District of Texas (sometimes referred to as the "Western District"). The case was transferred, under 28 U.S.C. § 1407, to the MDL court in the Southern District of Indiana, which had been established to deal with the more than 700 similar cases against Ford and Firestone.[2] *See In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Action,* 305 F.Supp.2d 927, 929 (S.D.Ind.2004). At about the same time that plaintiffs filed this suit, another case, *Manez,* involving similar circumstances, was also transferred to the MDL court.

Before considering the plaintiff's case, the MDL court examined the merits of a FNC motion in *Manez.* Petitioners (who were also the defendants in *Manez*) filed the FNC motion, claiming that Mexico was an available – and more appropriate – forum. The defendants "stipulated that they [would] submit to personal jurisdiction in Mexico." *Id.* at 932. The court stated, relying on Fifth Circuit precedent, that "[n]umerous cases have held Mexico to be an adequate forum for tort litigation involving American-made

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[2] Unlike the instant case, the vast majority of these MDL cases involved plaintiffs domiciled in the United States.

products, despite differences in Mexican and U.S. substantive and procedural law." *Id.* (citing *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 379-83 (5th Cir.2002)). The MDL court granted the FNC motion in *Manez*. *Id.* at 939.

The *Manez* plaintiffs appealed to the Seventh Circuit Court of Appeals, as is proper under MDL procedure. *See In re Bridgestone/Firestone, Inc.*, 420 F.3d 702 (7th Cir.2005). On appeal, the court noted that the district court's FNC decision was "quite reasonable" and said that "this case looks like an easy candidate for a straightforward affirmance." *Id.* at 704-05. The court then noted, however, that there was a "wrinkle" that prevented the easy affirmance: two *ex parte* Mexican court decisions that stated the case could not be tried in Mexican courts. *Id.* at 705. The court noted that it had "substantial misgivings about the plaintiffs' actions" in submitting the orders but held that it did "not have an adequate record to assess whether the plaintiffs' actions were taken in good faith." *Id.* at 706. It remanded for the MDL district court "thoroughly [to] explore the circumstances" surrounding the Mexican decisions. *Id.*

On remand, the district court "conducted an evidentiary hearing to thoroughly explore the circumstances surrounding the [Mexican] courts' decisions." *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 470 F.Supp.2d 917, 919 (S.D.Ind.2006). The court concluded that in seeking the Mexican dismissal order, "the attorneys for Plaintiffs acted with the clear purpose of having the case dismissed[ ] and,

in seeking that result, manipulated the process to insure that the dismissal would be based on a particular reason that was calculated to improve the chances of the dismissal being sustained on appeal." *Id.* at 920. Specifically, it noted e-mails between attorneys discussing how one Mexican judge "confirmed that she will throw out the suit according to what we planned." *Id.* at 925. The MDL court dismissed the case on FNC grounds, and the decision was not appealed. The MDL court later sanctioned the *Manez* plaintiffs' expert witness, Dr. Leonel Pereznieto, noting that he was "the apparent mastermind behind these frauds on the U.S. and Mexican courts." *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 470 F.Supp.2d 931, 933 (S.D.Ind.2006).[3]

After that dismissal, the MDL court asked all parties to show cause why their cases should not be dismissed. Plaintiffs did not initially respond, but another plaintiff did submit a reply. Petitioners responded to that reply and specifically asked that plaintiffs' case be dismissed.

Plaintiffs then filed a response, insisting that Mexico was not an available forum. Filed with the response were several dismissal orders, obtained *ex*

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[3] The Seventh Circuit overturned the sanctions decision on the ground that Pereznieto had not received "constitutionally adequate notice and an opportunity to be heard in the proceeding that led to the $100,000 fine." *Manez v. Bridgestone/Firestone N. Am. Tire, LLC*, 533 F.3d 578, 593-94 (7th Cir.2008). The matter is currently pending in the MDL court on remand.

parte from Mexican courts, that allegedly claimed that foreign defendants cannot be sued in Mexico for tort cases, even if they submit to jurisdiction there.[4]

The MDL court agreed with plaintiffs that Mexico is not an available forum; it denied petitioners' motion to dismiss. The court then ordered a conditional return of the case to the Western District.

Petitioners filed a motion for reconsideration, an alternative motion to certify the issue for interlocutory appeal to the Seventh Circuit, and an objection to the conditional remand order. Plaintiffs opposed all the motions; the MDL court did not rule on any of them before the MDL panel returned the case to the Western District. Six weeks after that occurred, the MDL court dismissed all of the motions as moot.

After the case had been returned to the Western District, Petitioners again filed a motion for reconsideration of the MDL court's FNC decision. They submitted new evidence regarding the *ex parte* dismissal orders, allegedly showing that they had been fraudulently obtained. Judge Hudspeth of the Western District denied the motion, opining that "[w]hen a civil action has been through the MDL process and has been remanded . . . the pretrial rulings made by the transferee court should be reconsidered, if at all, under only the most extraordinary

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[4] Petitioners have agreed to submit themselves to the jurisdiction of Mexican courts.

circumstances. To do so would go a long way toward defeating the entire purposes of the MDL process." (citing *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 n. 5 (7th Cir.1996); *In re Food Lion, Inc.*, 73 F.3d 528, 531-32 (4th Cir.1996)). Judge Hudspeth expressed his view that such extraordinary circumstances are not present in this case and that he believed that the petitioners did not actually want to have their case tried in Mexico but only wanted to delay the trial. Also, he denied an interlocutory appeal to this court because, in his opinion, this was a delay tactic. Petitioners ask us to grant mandamus on the FNC issue.

II.

The issue – whether we can grant mandamus on a district court's refusal to reconsider a pretrial MDL decision – is one of first impression in this circuit. We examine the question in two parts. First, we see whether the district court improperly denied the motion for reconsideration. If we decide that the district court did err, we next look to see whether we can properly grant mandamus in the procedural posture of Judge Hudspeth's denial of reconsideration.

A.

We begin by addressing how MDL transferor courts review the pretrial determinations of transferee MDL courts.[5] We have not established a standard for review of this question, though we note that authorities are unanimous that some deference must be given to the transferee court's decisions.

> [I]t would be improper to permit a transferor judge to overturn orders of a transferee judge even though error in the latter might result in reversal of the final judgment of the transferor court. If transferor judges were permitted to upset rulings of transferee judges, the result would be an undermining of the purpose and usefulness of transfer under [28 U.S.C. §] 1407 for coordinated or consolidated pretrial proceedings because those proceedings would then lack the finality (at the trial court level) requisite to the convenience of witnesses and parties and to efficient conduct of actions.[6]

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[5] A transferor court refers to the court in which the suit was begun (here, the Western District of Texas); the transferee court refers to the court to which the case was transferred for MDL pretrial rulings (the Southern District of Indiana).

[6] Stanley A. Weigle, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 577 (1978).

That view is nothing short of a bright-line rule that a transferor court cannot overrule a transferee court. Several courts have cited this maxim.[7]

Other commentators and courts, however, have rejected a bright-line approach and instead have advocated only substantial deference to the transferee court. "The general rules are not surprising: deference to the decisions reached by the prior judge and jurisdiction or authority to modify those rulings. This is particularly true for rulings which the transferee court could have itself modified." MULTI-DISTRICT LITIGATION MANUAL § 10:17. "It would vitiate much of the purpose of consolidating litigation if, after remand, parties could simply re-visit the transferee court's pre-trial rulings, and force the common defendant to deal piecemeal with once-collective matters." *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 n. 5 (7th Cir.1996).

Instead of promoting general deference, others have stated that the "law of the case" should apply where a transferor court is deciding whether to overturn the decision of a transferee court. "Although the transferor judge has the power to vacate or modify rulings made by the transferee judge, subject to comity and 'law of the case' considerations, doing so in the absence of a significant change of circumstances would frustrate the purposes of centralized

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[7] *See, e.g., In re Food Lion, Inc. Fair Labor Standards Act Effective Scheduling Litig.*, 73 F.3d 528, 531 (4th Cir.1996).

pretrial proceedings." MANUAL FOR COMPLEX LITIGATION § 20.133. Some courts have agreed with this viewpoint.[8]

The better view is the latter – that transferor courts should use the law of the case doctrine to determine whether to revisit a transferee court's decision. Moreover, a bright-line rule cannot be reconciled with our precedent in similar situations: "The revisitation by the court of [an] earlier order . . . was not error because . . . a court may correct its own errors. The fact that [the judge] was not correcting his own error, but that of another judge who initially had been in charge of the case, is no moment." *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir.1993) (citation omitted).

We have also used the law of the case doctrine when examining a situation "in which one judge has rendered an order or judgment and the case is then transferred to another judge." *United States v. O'Keefe*, 128 F.3d 885, 892 (citing *Abshire v. Seacoast Prods.*, 668 F.2d 832, 838 (5th Cir.1982)). "Under the law of the case doctrine and general principles of comity, a successor judge has the same discretion to reconsider an order as would the first judge, but should not overrule the earlier judge's order or judgment merely

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[8] *See, e.g., In re Multi Piece Rim Prods. Liab. Litig.*, 653 F.2d 671, 678 (D.C.Cir.1981) ("The doctrine of the law of the case has its application in multidistrict litigation as well as in traditional litigation." (citing *ABC Great States, Inc. v. Globe Ticket Co.*, 316 F.Supp. 449 (E.D.Pa.1970))).

because the later judge might have decided matters differently." *Id.* (citing *Loumar, Inc. v. Smith,* 698 F.2d 759, 762-63 (5th Cir.1983)).

In reviewing transferee court decisions under the law of the case doctrine, transferor courts should rarely reverse, because any widespread overturning of transferee court decisions would frustrate the principle aims of the MDL process and lessen the system's effectiveness. The law of the case doctrine "requires attention to the special authority granted to the multidistrict transferee judge" and ensures that transferor courts respect the transferee court's decisions. *Multi-Piece Rim,* 653 F.2d at 678. That doctrine also has the virtue of allowing transferor courts to correct serious errors of the transferee court.

B.

The law of the case doctrine requires that courts not revisit the determinations of an earlier court unless "(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work . . . manifest injustice." *Propes v. Quarterman,* 573 F.3d 225, 228 (5th Cir.2009) (citing *Goodwin v. Johnson,* 224 F.3d 450, 457-58 (5th Cir.2000)) (ellipses in original). Since the MDL court's ruling, no new controlling authority has overruled the decision. Though petitioners have presented new evidence that calls into question the

plaintiffs' *ex parte* orders from Mexico,[9] we need not decide whether that evidence is enough to invoke the law of the case doctrine.[10]

Instead, we conclude that the transferee court's FNC decision is so clearly erroneous that it would work manifest injustice in this case. Because the transferor court should have recognized its serious error, its decision not to vacate its decision regarding FNC was also clearly erroneous.

We have held in numerous cases that Mexico is an available forum for tort suits against a defendant that is willing to submit to jurisdiction there. In *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 671 (5th Cir.2003), we examined a case in which the defendant had stipulated to the jurisdiction of Mexican courts.[11] The district court found that the "stipulation . . . made Mexico an available forum." *Id.*

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[9] Plaintiffs claim that this evidence could not be considered by the transferor court, so we therefore cannot consider it. This is incorrect. Under the law of the case doctrine, one of the explicit reasons for overturning an earlier decision is the submission of new evidence; this would be impossible under plaintiffs' theory. If new evidence has been acquired since the transferee court's decision, it may be submitted to the transferor court.

[10] Nothing in this opinion should prevent the transferor court, on any later reconsideration of the MDL decision, from examining petitioners' evidence that rather convincingly shows the *ex parte* orders may be fraudulent.

[11] *Vasquez* is importantly similar to the instant case in that it involved personal injuries resulting from a vehicle crash involving Firestone tires in Mexico.

We agreed with that conclusion, noting that there was no dispute regarding whether Mexico was available as long as the defendant submitted to jurisdiction. *Id.*

Again, in *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 380 n. 3 (5th Cir.2002), we held that "[i]t is undisputed that Mexico is an amenable forum because the defendants have agreed to submit to the jurisdiction of the Mexican courts." Both *Vasquez* and *Gonzalez* involved torts against foreign defendants – the same kind of suit that the instant plaintiffs allege is not available in Mexico even where a defendant submits to jurisdiction.

Finally, in *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 804 (5th Cir.2007), we agreed with the district court's finding that "Mexico is an adequate and available forum." Other district courts have also concluded that Mexico is an available forum in such cases.[12] Similarly, a "defendant's submission to the jurisdiction of an alternative forum renders that forum available for the purposes of [FNC] analysis." *Veba-Chemie A.G. v. M/V GETAFIX*, 711 F.2d 1243, 1245 & n. 3 (5th Cir.1983).[13]

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[12] *See de Aguilar v. Boeing Co.*, 806 F.Supp. 139 (E.D.Tex.1992); *see also Zermeno v. McDonnell Douglas Corp.*, 246 F.Supp.2d 646, 658-59 (S.D.Tex.2003).

[13] Even the plaintiffs seem to concede that *Veba-Chemie* is harmful to their position. In a supplemental letter brief, plaintiffs interpret *Veba-Chemie* "to mean that where it is unknown or cannot be easily determined whether a foreign

(Continued on following page)

These many decisions create a nearly airtight presumption that Mexico is an available forum. We have held that if a defendant submits to jurisdiction, there is a presumption of forum availability; petitioners have done so here. We have held in tort cases (even one case involving nearly identical facts) that Mexico is an available forum for tort suits against foreign defendants. "Our rule of orderliness 'forbids one of our panels from overruling a prior panel.'"[14] Thus, unless this court en banc or the Supreme Court decides otherwise, petitioners' willingness to submit to jurisdiction in Mexico makes it an available forum for FNC purposes, based on the binding precedent of this court.

District courts do not have to start from scratch each time they consider a forum's availability; if we have found a forum to be available in earlier cases, district courts can rely on our precedent in similar cases to hold that it is still available. Unless plaintiffs can show evidence distinguishing this case from our precedent, an order from a Mexican court dismissing *this exact case* for lack of jurisdiction, or reliable evidence of some subsequent change in Mexican law that calls our earlier determinations into serious

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jurisdiction is or is not an available forum, it can be presumed that it would be available when there is a consent to jurisdiction."

[14] *Pretus v. Diamond Offshore Drilling, Inc.*, 571 F.3d 478, 487 (5th Cir.2009) (Smith, J., dissenting) (quoting *Teague v. City of Flower Mound, Tex.*, 179 F.3d 377, 383 (5th Cir.1999)).

question, plaintiffs cannot prevail in their FNC defense. Because no such evidence was presented, the transferee and transferor courts clearly erred in refusing to grant the FNC dismissal.[15]

Along with failing to consider our earlier binding opinions, the MDL court erred when it relied solely on

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[15] Though the MDL court was not sitting in the Fifth Circuit, plaintiffs' cases all originated in the district courts of this circuit. Merely moving this case from the Western District of Texas to the Southern District of Indiana does not allow plaintiffs to circumvent our earlier binding precedent that Mexico is an available forum. Such a perverse result would allow a case to proceed improperly just because it happened to be before an MDL panel.

> The result that occurred here undermines the goals of § 1407(a), which requires MDL cases to be transferred to promote "the *just* and efficient conduct" of proceedings. 28 U.S.C. § 1407(a) (emphasis added). It is not "just" to require petitioners to defend their suit in the Western District merely because plaintiffs were able to transfer to an MDL panel in another circuit. Although there is disagreement among courts on this point, the better view is that, because forum-availability law is "geographically non-uniform, a transferee court should use the rule of the transferor forum in order to implement the central conclusion of [*Van Dusen v. Barrack*, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964)] and [*Ferens v. John Deere Co.*, 494 U.S. 516, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990)]: that a transfer . . . accomplishes 'but a change of courtrooms.'" *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1127 (7th Cir.1993). For there to be "but a change of courtrooms" here, the MDL court should have applied *Vasquez* and *Gonzalez* to find that Mexico is an available forum.

the plaintiffs' *ex parte* orders from Mexican courts without any expert testimony. At oral argument, plaintiffs' counsel conceded that they had submitted only two experts to the MDL court: Leonel Pereznieto and Mexican Judge Garcia Estrada. Counsel also admitted that the MDL court struck both Pereznieto's and Estrada's testimony. Thus, plaintiffs had no experts on whom to rely. Instead, they submitted only *ex parte* orders allegedly showing Mexico is not an available forum. The MDL court relied on those orders in denying petitioners' FNC motion.

The MDL court erred twice in using the *ex parte* orders to reach its decision. First, the court should have required expert testimony to analyze the *ex parte* orders and other important materials, such as Mexican code provisions and Mexican Supreme Court or appellate decisions.[16] Second, relying solely on these *ex parte* orders was error. We recognize that in Mexican courts, jurisdictional decisions *can* be given *ex parte* without necessarily violating any rules. Plaintiffs, however, have not submitted any evidence to show that these orders *must* be issued without the opposing counsel's being present. Especially in a case such as this – where other similarly situated plaintiffs have acted fraudulently – the MDL court should have asked for orders that were issued in courts in

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[16] Even with this expert testimony, the experts would have to present strong evidence that their case is distinguishable from our earlier precedent in order to overcome the presumption that Mexico is an available forum.

which both parties were present, to ensure there was no fraud. By not having expert testimony, and by relying on *ex parte* orders obtained without the presence of opposing counsel, the MDL court again erred.

Finally, but importantly, we note that petitioners were and are willing to submit to a return jurisdiction clause. As we noted for the plaintiff in *Vasquez,* "[t]here is no guarantee that [Mexico] will remain an available forum or that defendants will submit to its jurisdiction. A return jurisdiction clause remedies this concern by permitting parties to return to the dismissing court should the lawsuit become impossible in the foreign forum." *Vasquez,* 325 F.3d at 675. Petitioners stated that they will accept a return jurisdiction clause, and this weighs heavily in favor of finding that the MDL court erred.

The evidence put before the MDL court was rather equivocal on whether Mexico was an available forum; both sides submitted experts,[17] code provisions, court decisions, and orders showing Mexico to be either an available or unavailable forum. With such uncertainty, a return – jurisdiction clause must weigh heavily in favor of granting the FNC motion. That clause will allow both sides – rather than just plaintiffs – to go before a judge in Mexico and find out whether *this specific suit* can be tried there. If Mexico will not hear the case, plaintiffs can re-file in Texas

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[17] Plaintiffs' experts' testimony was struck from the record.

and proceed to trial. In the face of evidence and caselaw showing Mexico to be an available forum, it was clear error for the MDL court to reject this option.

For all of these reasons, under the law of the case doctrine, the transferor court should have reconsidered the MDL court's FNC decision for manifest injustice. In light of the binding caselaw, the lack of expert evidence, and the willingness of the petitioners to submit to a return jurisdiction clause, Mexico was the proper forum. Having found that there was manifest injustice and that the transferor court clearly erred in not reconsidering the MDL court's FNC decision, we now must see whether this case meets our criteria for granting mandamus relief.

III.

Mandamus is an appropriate remedy for "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004) (citations and internal quotation marks omitted); *see In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309 (5th Cir.2008) (en banc), *cert. denied*, ___ U.S. ___, 129 S.Ct. 1336, 173 L.Ed.2d 587 (2009). Plainly, a transferor court's refusal to reexamine a transferee court's FNC decision can be one of the "exceptional circumstances," so long as the refusal meets our stringent criteria for granting mandamus. "[C]ourts reviewing petitions for mandamus 'must be careful lest they suffer themselves to be misled by

labels such as "abuse of discretion" and "want of power" into interlocutory review of nonappealable orders on the mere ground that they may be erroneous.'" *Volkswagen,* 545 F.3d at 309 (citing *Will v. United States,* 389 U.S. 90, 98 n. 6, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967)).

In *Volkswagen,* we noted that an abuse of discretion occurs where a court "(1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *Id.* at 310 (citation omitted). "On mandamus review, we review for these types of errors, but we only will grant mandamus relief when such errors produce a patently erroneous result." *Id.* Showing that there was a clear abuse of discretion, however, is not enough:

> The Supreme Court has established three requirements that must be met before a writ may issue: (1) the party seeking issuance of the writ must have no other adequate means to attain the relief he desires – a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process; (2) the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable; and (3) even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that

> the writ is appropriate under the circumstances.

Id. at 311. (citation, internal quotation marks and brackets omitted). "These hurdles, however demanding, are not insuperable." *Id.* (citation omitted).

For the reasons we have explained, there was a clear abuse of discretion, because the transferor court refused to alter a transferee court's decision that relied on an erroneous conclusion of law. Petitioners submitted to jurisdiction in Mexico, and our caselaw plainly holds that Mexico is an available forum. It was patently erroneous for the MDL court to ignore this binding precedent and equally erroneous for the transferor court to accept that decision.

We additionally find comfort in granting mandamus in light of the fact that this is an extraordinary case. Snippets of the record that counsel that result include, in no particular order of significance, the fact that plaintiffs' expert on Mexican law was the same person who had been employed by the *Manez* plaintiffs and who had been sanctioned by the MDL court for bad faith and fraudulent conduct. Moreover, to show that Mexico was unavailable, plaintiffs submitted *ex parte* dismissal orders that were suspiciously similar to orders proffered in *Manez,* in which the MDL court had declared that those plaintiffs had deliberately and fraudulently obtained the dismissals for the express purpose of defeating an FNC motion. Then, on the same day it denied the FNC motion, the MDL court suggested to the JPML

that the cases be remanded immediately to the district courts *a quo*.

As a result of that remand, the MDL court never ruled on petitioners' motion to reconsider, but just dismissed the motion as moot long after the matter had been remanded to the transferor court and after the MDL court no longer had jurisdiction.[18] The transferor court never considered the merits of the motion to reconsider, but only denied that motion on the mistaken belief that the court lacked discretion to reach the merits.[19]

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[18] Because the motion to reconsider involved only the handful of plaintiffs in the instant case, a ruling by the MDL court would not have had broad implications for the caselaw on MDL proceedings. That serves as another reason why that court should have ruled on the motion to reconsider.

[19] Reconsideration by the transferor court would have posed no threat to the MDL process and, in fact, would have fostered the salutary goal of consistency in that process. The inconsistencies between the treatment of the *Manez* and the instant plaintiffs are striking.

> First, the MDL court dismissed *Manez* on FNC grounds by concluding that Mexico is an available forum under Fifth Circuit precedent. Second, after the Seventh Circuit had remanded *Manez*, the MDL court ruled that those plaintiffs had acted in bad faith in securing fraudulent dismissals in Mexico to strengthen their position in the MDL proceedings; the MDL court thus dismissed again, on FNC grounds, stating that Mexico was available.
>
> Third, the MDL court departed from its earlier ruling and denied the present petitioners' FNC motion on the ground that they had not proven their contention that

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Petitioners also lack any other adequate means to attain relief. They attempted to have the MDL court's decision certified for appeal to the Seventh Circuit and asked for reconsideration by both the MDL court and the transferor court. All of these attempts were rejected.[20]

We also held en banc in *Volkswagen* that, in these FNC cases, mandamus is appropriate on this prong because, if the issue is argued only on any eventual direct appeal, there is no way to show that the outcome of the case would have been different, and any inconvenience to the parties "will already have been done by the time the case is tried and appealed." *Id.* at 318-19. "[T]he writ is not here used as a substitute for an appeal, as an appeal will provide no remedy for a patently erroneous failure to transfer venue." *Id.* at 319. We were straightforward in

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Mexico is available. Fourth, in a bizarre reversal, the court granted an FNC motion in the almost-identical case of *Cantu,* concluding that, in reliance on Fifth Circuit caselaw, Mexico is an available alternative forum.

[20] We note our distaste at plaintiffs' argument that this case should not be considered by this court because it should have been appealed to the Seventh Circuit. Petitioners moved for leave to take an interlocutory appeal to the Seventh Circuit, but plaintiffs opposed the motion. Plaintiffs' wish was granted, and the Seventh Circuit declined to hear the case. It is disingenuous at best for them now to claim that this court's jurisdiction was improper, when they opposed all other avenues for reconsideration of the decision.

Volkswagen that these FNC cases are in the "no other means to attain relief" category. *Id.* at 318.

Additionally, the petitioners have a clear and indisputable right to the writ. That follows from our finding of a clear abuse of discretion: "If the district court clearly abused its discretion . . . in denying [the] motion, then [the petitioners'] right to issuance of the writ is necessarily clear and indisputable." *Id.* at 311. There was a clear abuse of discretion, so petitioners are entitled to a writ of mandamus.

Finally, we must be satisfied that the writ is appropriate in this circumstance. A writ of mandamus is "supervisory in nature and [is] particularly appropriate when the issues also have an importance beyond the immediate case." *Id.* at 319 (citation omitted). There are at least two other similar cases pending in the MDL court that were initially filed in Texas. In addition, other suits may be filed in our district courts involving the question whether Mexico is an available forum in our circumstances. This issue is not specific to this case but is relevant for a variety of similar cases that have arisen or may arise in the district courts of this circuit. Recognizing this, a writ of mandamus is called for here. Considering the return-jurisdiction clause and our the [sic] binding precedent, it is plain that this trial should not take place in American courts unless a Mexican forum is unavailable.

For all of the above reasons, the district court erred in not overruling the MDL court's FNC

decision, and that error is serious enough to require mandamus as the appropriate relief. We direct the district court to render a judgment of dismissal without prejudice, because Mexico is an available and appropriate forum. Plaintiffs can re-file this suit and proceed to trial in the Western District of Texas on a sufficient showing that the Mexican courts are unavailable for this litigation despite petitioners' submission to jurisdiction there. Plaintiffs must litigate in good faith in Mexican courts, and evidence showing otherwise may justify sanctions against plaintiffs and their counsel.

The petition for writ of mandamus is GRANTED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re: BRIDGESTONE/FIRESTONE, INC., TIRES PRODUCTS LIABILITY ACTION	Master File No. IP 00-9374-C-B/S MDL No. 1373
This Document Relates to: ANTONIO GUEVARA MENDOZA, et al. v. BRIDGESTONE/FIRESTONE, INC., et al.,	Case No. IP 04-C-5797-B/S
ROSA VIDRIO CALVO, et al., v. BRIDGESTONE/FIRESTONE, INC., et al.	Case No. IP 04-5798-C-B/S
MARISOL GOMEZ LOPEZ, et al., v. BRIDGESTONE/FIRESTONE, INC., et al.	Case No. IP 04-5799-C-B/S

ROBERTO ACENLO VALLE, et al., v. BRIDGESTONE/FIRESTONE, INC. et al.	Case No. IP 04-5800-C-B/S
ESTEBAN QUIJANO BONFIL, et al., v. BRIDGESTONE/FIRESTONE, INC. et al.	Case No. IP 04-5801-C-B/S
OLIVER FLORES BARENO, et al., v. BRIDGESTONE/FIRESTONE, INC. et al.	Case No. IP 04-5802-C-B/S
LOURDES LIZBETH MENDIVIL GALAVIZ, et al. v. BRIDGESTONE/FIRESTONE, INC., et al.	Case No. IP 04-5810-C-B/S

ENTRY REGARDING
***FORUM NON CONVENIENS* ISSUES**

Pending before the Court in the above-captioned cases is a motion filed by Defendant Bridgestone/Firestone North American Tire, LLC ("Firestone") entitled Motion to Adopt and Join All Previous Filings

Relating to *Forum Non Conveniens* and Request for Judicial Notice Thereof (docket no. 3638) ("Motion to Adopt"), which later was joined in by Defendant Ford Motor Company ("Ford") (docket no. 3675).[1] For the reasons set forth below, the Court, being duly advised, **GRANTS** the Motion to Adopt to the extent that the Defendants ask the Court to permit them to adopt and join all of their previous filings relating to the *forum non conveniens* issue in Mexican accident cases and to take judicial notice of certain related rulings. Upon adopting and considering the previous filings and rulings, as well as the parties' filings relating to the Motion to Adopt,[2] the Court determines

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[1] We note for the sake of thoroughness that also outstanding is an Order to Show Cause that relates to the *forum non conveniens* issue; the plaintiffs in these cases have satisfied that Order by either their specific response thereto or their response to the Motion to Adopt, and accordingly we discharge the same. Also pending is the Defendants' Motion to Strike certain additional briefs that were filed by the Plaintiffs without leave of court (docket no. 3746, seeking to strike docket nos. 3744 and 3745); the Motion to Strike is **GRANTED**, and the Court has not considered the additional briefs. Neither have we considered any arguments contained in the Plaintiffs' superfluous motion entitled Motion for Final Ruling on *FNC* (docket no. 3777) and the Defendants' response thereto (docket no. 3788).

[2] Specifically, we have considered the relevant information and arguments contained in the various Plaintiffs' filings in response to the Motion to Adopt (docket nos. 3659, 3678, 3681, 3695) and the Defendants' reply thereto (docket no. 3736). The Court recognizes that in one of these cases (04-5810) the Plaintiffs' briefing has been a bit unconventional, consisting of a "provisional" response, a "supplemental" response, and an "addendum" to the supplemental response. However, the procedural

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that the Defendants have not demonstrated the propriety of dismissing these cases on *forum non conveniens* grounds, and therefore **DENIES** the Defendants' request for such dismissal in the Motion to Adopt.

Background

This is the second time in this MDL proceeding that the Court has addressed substantively the issue of *forum non conveniens* ("FNC") in cases involving accidents that occurred in Mexico. In the first instance, we resolved the Defendants' motion to dismiss four such cases by denying the motion as to those plaintiffs who were residents of the United States and granting the motion as to those plaintiffs who were not. *In re Bridgestone/Firestone, Inc.*, 305 F.Supp.2d 927 (S.D. Ind. 2004) (hereinafter referred to as the "*Lopez* Decision").[3] The above-captioned

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posture of these cases is also somewhat unusual, so the Court does not fault the Plaintiffs for the manner in which they have presented their arguments, and the Defendants have filed a comprehensive reply brief in which they respond to all of the Plaintiffs' filings.

[3] The plaintiffs in the *Lopez* case appealed the dismissal of their case and the case ultimately was remanded for resolution of certain issues that were specific to that case and irrelevant to the issues at hand. *See In re Bridgestone/Firestone, Inc.*, 420 F.3d 702 (7th Cir. 2005). However, to the extent that the briefing that occurred in that case after remand is relevant to the instant cases, we have considered it as requested by the Defendants.

cases were not addressed in the *Lopez* Decision because they were transferred to this MDL after the briefing had been completed (and in some cases after the ruling was issued). The issue before the Court now is whether these cases (all of which involve plaintiffs who are not U.S. residents) also are subject to dismissal on *forum non conveniens* grounds for the reasons set forth in the *Lopez* Decision. For the reasons set forth below, the Court determines that they are not.

Legal Analysis

"A federal court has discretion to dismiss a case on the ground of *forum non conveniens* when an alternative forum has jurisdiction to hear the case, and trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience, or the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems." *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 127 S.Ct. 1184, 1190 (2007). An alternative forum cannot be more convenient if the case cannot be tried there, and therefore the threshold inquiry in any *forum non conveniens* analysis is always the availability of the forum proposed by the defendant. The defendant bears the burden of persuasion on that and all other issues relating to whether dismissal for *forum non conveniens* is appropriate. *In re Ford Motor Co., Bridgestone/Firestone*

North American Tire, LLC, 344 F.3d 648, 652 (7th Cir. 2003).

In the *Lopez* case, the fact that Mexico[4] was an available forum essentially was conceded by the plaintiffs in the course of briefing the motion to dismiss, and therefore we only summarily addressed the issue in that decision:

> Defendants have stipulated that they will submit to personal jurisdiction in Mexico and that they will not assert any statute of limitations defense based on the time that has elapsed while these cases were pending before this court. There is no indication that the Mexican courts would not accept such a stipulation. Therefore, Mexico is an available forum.

305 F.Supp.2d at 932 (citations and footnote omitted). However, the plaintiffs in these cases vigorously dispute the availability of the Mexican courts to hear their cases. Therefore, it is necessary for us to fully address the issue now.

Both the Plaintiffs and the Defendants agree that under Mexican law a court must have "territorial

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[4] As we noted in the *Lopez* Decision, 305 F.Supp.2d at 932 n.3, although we refer at times for simplicity's sake to "Mexico" and "Mexican courts" in general, we recognize that Mexico's judicial system is similar to our own in that it is comprised of 31 states and a federal district, each with its own laws.

competence" over a case[5] in order to hear it. They further agree that the general rule is that a court does not have territorial competence over a particular case unless one of the defendants is domiciled within the court's jurisdictional territory. Put another way, in general, the proper place for a case to be filed in Mexico is the state in which the defendant is domiciled; if there are multiple defendants who are domiciled in different states, the plaintiff may choose to file her case in any state in which at least one defendant is domiciled, and the court in that state would have the territorial competence to hear the case against all of the defendants.

Under this general rule, the Plaintiffs in these cases would not be able to file their cases in any Mexican court because the Defendants are all U.S. corporations who are not domiciled in Mexico. However, the Defendants have agreed to submit to the Mexican courts' jurisdiction, and they argue that Mexican law permits a court to exercise territorial competence over a defendant if the defendant either explicitly or implicitly consents. In support of their arguments, the Defendants rely upon the opinions of Mexican lawyer and law professor Emilio Gonzalez de Castilla del Valle ("Mr. Castilla"). The Court heard extensive testimony from Mr. Castilla during the

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[5] Throughout this discussion, when we refer generally to "a case," we mean the type of case at issue here; in other words, a personal injury action arising out of an allegedly defective product.

course of the *Lopez* hearings and found him to be a well-qualified and credible expert regarding Mexican law.[6] That said, however, Mr. Castilla's opinions are based upon his own academic reading of certain statutory provisions, rather than instances in which Mexican courts actually have applied those provisions. One need look no further than the decisions of our own Supreme Court – or any volume of any law review – to confirm that learned and reasonable jurists can and do disagree regarding the meaning

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[6] In addition to Mr. Castilla's testimony in the *Lopez* matter, the Defendants submitted an affidavit from Mr. Castilla in conjunction with that case, and also have submitted along with their Reply in support of the instant motion a December 2006 affidavit submitted by Mr. Castilla in conjunction with another case. We note, however, that Mr. Castilla has not opined specifically regarding the ability of the Plaintiffs in these cases to pursue their claims in Mexico, and the Defendants have not presented any other evidence or argument regarding which Mexican jurisdictions would be available to these specific plaintiffs and what the law is in those jurisdictions, although Mr. Castilla did testify that the same relevant statutory provisions are present in the laws of each Mexican state as well as in Mexican federal law. *Lopez* Hearing Transcript at I-62 (docket no. 3558). We note that the relevant laws of the various states are not identical, however, as is evidenced by, *inter alia*, Mr. Castilla's discussion of the particular laws in Tamaulipas. Castilla Affidavit, Exhibit A to Defendants' Reply to Plaintiffs' Show Cause Filings, at p. 7 (hereinafter "Second Castilla Affidavit") ("In addition the Tamaulipas Code (like the one in Morelos) goes further than the Nuevo Leon Statute in stating that if defendant does not have a fixed domicile within the State or if it is unknown, the competent court would be that of the legal domicile of plaintiff.").

and proper application of statutes in this country, and it appears that Mexico is no different in that regard.

The Plaintiffs in these cases have submitted evidence that suggests that the practice of Mexican courts is indeed inconsistent with Mr. Castilla's opinions. Specifically, the Plaintiffs point to eighteen cases in eleven Mexican states in which the Mexican courts have declined to exercise jurisdiction in cases of this type because none of the defendants were domiciled in Mexico. The Defendants suggest that the rulings in these cases were obtained by means of manipulation by the plaintiffs, and perhaps that is so.[7] As Mr. Castilla explains:

> It is not unusual for a Mexican Court to set aside a claim at the outset when, contrary to the main purpose and objective, the plaintiff communicates "*ex parte*" to the court that it does not want to pursue the issues submitted in such venue.[8] Few Courts will question such unusual strategy and the plaintiff may not even disclose the full strategy to the Court. The Court could set the claim aside with the idea that no harmful consequences

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[7] We wonder, in passing, why the Defendants would prefer to litigate these cases in a legal system that they believe to be so easily manipulated.

[8] The parties agree that such *ex parte* communication with the court is not considered improper in Mexico, and therefore, unlike in this country, no ethical rules would be violated by such conduct.

> would arise since no defendant would have been summoned.

We found, after extensive consideration of the facts, that such manipulation, and indeed misconduct, by the plaintiffs occurred in the *Lopez* case, *see In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 470 F. Supp.2d 917 (S.D. Ind. 2006) (Entry Regarding Issues on Remand), and we note that another federal court has sanctioned an attorney who represents the Plaintiffs in some of these cases for "unreasonably and vexatiously multiplying" the proceedings before it by "doing what they could to obstruct Defendants' efforts to get the [Mexican] Court to exercise jurisdiction over the Plaintiffs' lawsuit." *See Garcia v. Ford Motor Co.*, 2007 WL 187803 at *4 (E.D. Mo., January 22, 2007).[9]

The fact that such manipulation is possible does not make it the only reasonable explanation for the seemingly consistent rulings by Mexican courts, however. Indeed, as Plaintiffs note, Defendants are unable to point to a single case that has proceeded in a Mexican court against a U.S. corporation based upon the defendant's consent to the court's exercise of territorial competence. The Defendants respond to this argument as follows:

> Finally, the plaintiffs repeatedly say that the defendants have cited 'no case' in which a

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[9] We note that the Plaintiffs in that case have moved to reconsider that ruling, which motion remains pending.

> Mexican court has exercised jurisdiction over the tort claims of a plaintiff against a defendant located in the United States. This is both misleading and irrelevant. As Professor de Castilla explains, other than a few precise exceptions for certain decisions by federal appellate courts, judicial decisions are not a source of law in the Mexican legal system. Unlike the practice in the United States, in Mexico it would be irrelevant to cite any "case" that did not fall within one of those narrow exceptions. Likely for this reason, there is no reporting system in Mexico by which those decisions can be located. It is not judicial decisions that make the law in Mexico, it is the provisions in the relevant code. And Professor de Castilla describes at length how those code provisions give Mexican courts jurisdiction over such claims.

Defendants' Reply to Plaintiffs' Show Cause Filings at p. 19-20. However, while Mexican judicial opinions might not be as readily obtainable as those in the United States, and while they might not constitute precedent, we find it striking that apparently neither the Defendants – both very large, multinational corporations who do business in Mexico – their lawyers, nor Mr. Castilla are aware of a single instance of such a case being heard by a Mexican court.

Further, even Mr. Castilla's own affidavits and testimony indicate that a conflict exists between his theoretical reading of the law and the actual practice

in Mexican courts. In a June 30, 2006, affidavit, Mr. Castilla states that:

> With regard to competence based on . . . territory, the judge shall admit the lawsuit and shall not reject it at the outset, because competence by territory may be – expressly or implicitly – waived and extended by prior agreement of the parties, or else by a unilateral decision; Plaintiff by submitting the case before such judge, and Defendant by responding to such claim (or, in its case filing a counterclaim), without challenging the competence through the appropriate means provided under the applicable procedural law.

Castilla Affidavit, Exhibit X to Defendants' Motion for Sanctions in *Lopez*, at p. 6 (hereinafter "First Castilla Affidavit"). This statement leads one to believe that a Mexican court[10] will not question its territorial

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[10] In his second affidavit, Mr. Castilla further limits this statement by stating that "in my view, not every court in Mexico should accept the case because, in my opinion, it is only those courts that have a point of contact with the specific case that should accept the case and serve the defendant" and therefore "a court with no point of contact whatsoever to the dispute (e.g. no point of contact with any of the parties or with any of the underlying facts or events) may dismiss the case at the outset for lack of territorial competence without waiting to see if the defendant will tacitly submit." Second Castilla Affidavit at p. 10. While Mr. Castilla does not expressly mention this limitation in his first affidavit, he did mention it in his testimony during the *Lopez* matter. *See Lopez* Hearing Transcript at I-62-64 (docket no. 3558). This seems to contradict his statement in his first

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competence to hear a case absent an objection by the defendant or some manipulation by the plaintiff. However, Mr. Castilla further states that:

> [S]hould plaintiff want the Court to accept jurisdiction – as would otherwise be the usual purpose of plaintiff's submission – in a case against non Mexicans with legal domicile abroad, it would "*ex parte*" explain the legal reasons why the Court should accept jurisdiction, on the grounds that such jurisdiction can be extended by agreement or by defendant responding to the claim without challenging the jurisdiction.

Id. at 7. This suggests that it is not necessarily a clear-cut and simple matter of the plaintiff filing suit and the defendant responding to the suit without objecting on the grounds of the court's territorial competence; rather, it appears that a court might well require some convincing that it should accept the case. Indeed, Mr. Castilla recognizes the possibility that a plaintiff's efforts might not be sufficient: "If unsuccessful at the lower Court, plaintiff would have the opportunity to fight for admission on appeal

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affidavit where he avers: "It has been a common practice in Mexico to have parties with legal domicile in other States, submit legal disputes to the Courts of Mexico City based on prior agreement or implicitly by responding to the case without challenge of jurisdiction . . . in light of the fact that these courts are deemed to be better prepared to address certain complex legal issues." First Castilla Affidavit at p. 5.

submitting the arguments to show the error of the lower court." *Id.*

Mr. Castilla's second affidavit also contains opinions that are inconsistent with his general statement that a Mexican court will accept a case at the outset and wait to see if the defendant tacitly consent [sic] to the court's territorial competence by not objecting to it. In his second affidavit, Mr. Castilla discusses the plaintiffs' actions in another case and states that it was improper for the plaintiffs to fail to attach to their complaint the "submission agreement" executed by the defendants setting forth their agreement to submit to the court's jurisdiction. Mr. Castilla states that "[e]stablishing the competence of the court would also have required, of course, that plaintiff had attached such Submission Agreement to its initial filing and developed the proper reasoning in the specific section of the complaint dealing with the competence of the court, as is normally done." Second Castilla Affidavit at p. 14-15. Again, this seems at odds with Mr. Castilla's theory that a defendant may tacitly agree to submit itself to a court's jurisdiction and that, absent some manipulation by the plaintiff, the court essentially will assume that it has territorial competence unless and until the defendant raises the issue. This contradiction is also seen in the *Garcia* case, in which the defendants (and the court) faulted the plaintiffs for failing to "join in executing an express submission agreement, to be filed along with the plaintiffs' complaint, by which the parties would consent" to the jurisdiction of the Mexican court;

under Mr. Castilla's theory, it would seem to be unnecessary to provide the court with such a written agreement.

Conclusion

After careful review of the opinions of Mr. Castilla and the parties' arguments, we are left with the distinct and firm impression that Mexican law in practice is not the same as what Mr. Castilla believes it should be in theory. As we have previously noted, the Defendants bear the burden of demonstrating that Mexico is an available alternative forum. In light of the fact that the Defendants' argument is based entirely upon the opinion of Mr. Castilla, and that his opinion does not appear to be consistent with the actual practice of Mexican courts, as evidenced by the complete absence of any cases where jurisdiction has been established in a Mexican forum under the circumstances described by Mr. Castilla and presented in the cases at bar, we conclude that the Defendants have failed to satisfy their burden. Accordingly, the Defendants' motion to dismiss these cases on *forum non conveniens* grounds is **DENIED**.

IT IS SO ORDERED.

Date: 07/16/2007 /s/ Sarah Evans Barker
SARAH EVANS BARKER,
JUDGE
United States District Court
Southern District of Indiana

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ANTONIO GUEVARA MENDOZA, et al. v. BRIDGESTONE/FIRESTONE, INC., et al.,	§	No. DR-03-CA-100-H
ROSA VIDRIO CALVO, et al., v. BRIDGESTONE/FIRESTONE, INC., et al.	§	No. DR-03-CA-108-H
MARISOL GOMEZ LOPEZ, et al., v. BRIDGESTONE/FIRESTONE, INC., et al.	§	No. DR-03-CA-109-H
ROBERTO ACENCIO VALLE, et al., v. BRIDGESTONE/FIRESTONE, INC. et al.	§	No. DR-03-CA-110-H
ESTEBAN QUIJANO BONFIL, et al., v. BRIDGESTONE/FIRESTONE, INC. et al.,	§	No. DR-04-CA-15-H

OLIVER FLORES BARENO, et al.,	§	No. DR-04-CA-16-H
v.	§	
BRIDGESTONE/FIRESTONE, INC. et al.	§	

ORDER REGARDING DEFENDANTS' MOTION FOR RECONSIDERATION

(Filed Dec. 22, 2008)

The respective Plaintiffs filed civil actions for damages in a state court in Val Verde County, Texas. The Defendants filed notices of removal, removing the cases to this Court. In February 2004, the first four cases[1] were transferred to the Panel on Multi-District Litigation and were assigned to the United States District Court for the Southern District of Indiana for the purpose of conducting joint pretrial proceedings. The two cases filed in 2004[2] were similarly transferred to the Southern District of Indiana in April 2004. In the transferee court, the Defendants argued that all six cases should be tried in Mexico rather than in the Western District of Texas, and they moved to dismiss on the basis of *forum non conveniens*. On July 16, 2007, the Honorable Sarah Evans Barker denied the Defendants' motions to dismiss. Thereafter, the Panel on Multi-District Litigation ordered

[1] The cases transferred to the MDL court in February 2004 were DR-03-CA-100, DR-03-CA-108, DR-03-CA-109, DR-03-CA-110.

[2] Those cases were DR-04-CA-15 and DR-04-CA-16.

the six cases remanded to the Western District of Texas. The District Clerk received the files from the MDL Panel on April 28, 2008. On August 7, 2008, the Honorable Alia Ludlum reassigned the six cases to this Court. In October 2008, the Defendants filed motions requesting this Court to reconsider and reverse Judge Barker's denial of their *forum non conveniens* motions.

When a civil action has been through the MDL process and has been remanded by the Panel to the transferor court, the pretrial rulings made by the transferee court should be reconsidered, if at all, under only the most extraordinary circumstances. To do otherwise would go a long way toward defeating the entire purpose of the MDL process. **See Winkler v. Eli Lilly & Co.**, 101 F.3d 1196, 1202 n.5 (7th Cir. 1996); **In re Food Lion, Inc.**, 73 F.3d 528, 531-32 (4th Cir. 1996). Those extraordinary circumstances are not present in these cases. The parties had a full and fair opportunity to litigate the issue of *forum non conveniens* before Judge Barker, whom this Court knows to be an experienced and well-respected trial judge.[3] If this Court were to reconsider and grant the Defendants' motions to dismiss these cases, the four years they spent in the MDL process would have accomplished nothing except to delay the rights of these Plaintiffs to have their day in court. This fact

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[3] Judge Barker is presently serving as President of the Federal Judges Association.

only goes to reinforce the usual presumption against reconsideration of the pretrial rulings of a transferee court.

There is no evidence, argument, or suggestion that the Defendants or the Plaintiffs cannot receive a fair trial in the Western District of Texas. Furthermore, the Court takes with a large grain of salt the Defendants' contention that they truly desire to subject themselves to the justice system of Mexico. It seems more probable that their stated desire for a Mexican trial is motivated by tactical considerations. Be that as it may, the Defendants need to resign themselves to the prospect of being afforded a fair trial in the Western District of Texas.

Foreseeing the possibility that this Court might deny their motions for reconsideration and their motions to dismiss, the Defendants request in the alternative that the Court certify the issues presented for an interlocutory appeal under 28 U.S.C. § 1292(b). Based on experience, the interlocutory appeal of a ruling in a civil action rarely accomplishes anything other than delaying the resolution of the case on the merits for a period of 12 to 18 months. These cases have been pending for five years already, and a further delay of this magnitude would be prejudicial to the Plaintiffs and possibly to the Defendants as well.

It is therefore ORDERED that the Defendants' motion for reconsideration of the order denying their motions to dismiss the above-styled and numbered

cases on the basis of *forum non conveniens* be, and it is hereby, DENIED.

It is further ORDERED that the Defendants' alternative motion to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) be, and it is hereby, DENIED.

SIGNED AND ENTERED this 19th day of December, 2008.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
SENIOR UNITED STATES
DISTRICT JUDGE